No. 22368

AUG 19 1968

# In The United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,

*Appellee,*

vs.

55.2 ACRES OF LAND, more or less in Yakima County Washington, and WILLIAM J. FOX, JR., et al.,

*Appellants.*

# BRIEF OF APPELLANT

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## JUDGMENT BELOW

The judgment below was based upon a verdict of a jury, the judgment and the verdict being found on pages 147 and 148 of the clerk's transcript. The jurisdiction of the court is based upon the act of Congress approved August 1, 1888, the Act of February 26, 1931, and the Act of August 27, 1958, authorizing the acquisition of land required for right of way in connection with the improvement of any section of the national

system of inter-state and defense highways (72 Stat. 893; 23 U.S.C. 107).

## STATEMENT

This action was instituted by the United States of America to acquire a right of way for the construction of Interstate Highway 82 (Tr. 1). The property of appellant lies just south of the town of Union Gap, a small commercial and industrial center in Yakima County, is but a few hundred feet from the city limits, and is served with all utilities including telephone, light, power and water. Before the take, appellant's property was used industrially, and for residential purposes. Appellant was engaged in a housemoving business and utilized the premises not only as his home but as a yard for his housemoving equipment, and a maintenance depot. Appellant's property was so completely taken that it was necessary for him to relocate.

## SPECIFICATION OF ERRORS

1.

The trial court erred in excluding evidence of the sale of Floyd to Fox (Tr. 85-119) (Reporter's transcript pages 165-181). Said sale was the property immediately adjacent to the subject property, was a sale that was committed by earnest money receipt prior to the time of the take, and completed by the execution of a contract subsequent to the time of the take and was a

sale more indicative of land values than any other comparable cited.

The question and objection are as follows (Reporter's Transcript 165, et seq) :

"Q. Mr. Lemon, didn't you close in your office a sale from Mr. Floyd to Mr. Fox on August 24, 1964?

A. Yes, I did.

MR. HULL: If the Court please, I am going to object to this purported sale on several grounds. First, this document is an offer to sell, it is not a completed sale; secondly, that the sale in question was completely after the date of taking in this case actually; thirdly, that it was influenced by the project and not comparable, therefore.

MR. HAWKINS: This comparable was one that took place, and the earnest money receipt, which is the document in your hands, was signed by both parties prior to the date of take. The contract carrying out that agreement was entered into after the filing of the papers here in court on August 31, 1964. We contend that it is a free and open market sale, closed by Mr. Lemon in his office, he was paid a commission on it according to the terms of that document that is in your hands, and it establishes that the fair market value of this property is $1,500.00 per acre."

The Court sustained the objection upon the following ground (Reporter's Transcript, page 169, 173) :

"THE COURT: Well I have been involved with livestock all my life, and I can't visualize anyone paying $1,500.00 an acre for pasture land. He would have to raise gold-plated cattle in order to come out. It just isn't logical; there is something about this that has to be different than pasture land."

"THE COURT: But Fox testified that he couldn't use

the freeway, and the judge heard that at that time; so how can you contend, Counsel, that that was the basis of his ruling, because he heard the testimony of Fox to the contrary. Fox said he couldn't get a permit to use the freeway in his housemoving business.

MR. HAWKINS: Well maybe I don't make myself clear, but the point I am making is that there is nothing in that transcript to support Judge Powell's ruling. Mr. Fox testified that he was not influenced by the coming of the freeway when he bought that."

2.

The trial court erred in sustaining an objection to the testimony of Mr. Clarence Marshall as to replacement cost of the buildings on appellant's property (Reporter's transcript 317), and in sustaining an objection to an offer of proof of testimony by the same witness that the cost less depreciation of the improvements on the land of appellant would be $35,000.00 (Reporter's transcript page 347, 348).

The record shows the question, the objection, the offer of proof as follows (Reporter's transcript, page 317):

"Q. Mr. Marshall, can you tell us the replacement cost on August 31, 1964, of the home—

MR. HULL: Object to the question. If the Court please, this is not a proper approach to valuation; no evidentuary purpose.

MR. HAWKINS: I think it is admissible; replacement cost is one of the standards of arriving at value, replacement less depreciation, your Honor.

MR. HULL: Cost less depreciation is only resorted to when there is no other, particularly fair market value approach. It certainly is not admissible in this case."

The record further shows, page 318:

"MR. HAWKINS: Your Honor, it is a generally accepted method of appraisal recognized by all real estate people in arriving at fair market value; you can either arrive at it from the basis of comparable sales, you can arrive at it from capitalized income or rentals, or you can arrive at it by replacement cost less depreciation. This is one of the recognized and accepted methods of arriving at values. There are the three recognized methods. There is no law that you must resort strictly and solely to the comparable sale method. Mr. Lemon testified that he did arrive at a unit value which he did apply in arriving at his figures, and this evidence would go in to refute or rebut that."

Further, the record shows that the Court in sustaining the objection stated, page 335:

"So how can you contend that you resort to other evidence such as reproduction cost in a case where there is ample opportunity to determine fair market value from other sources, Mr. Hawkins?

MR. HAWKINS: For two reasons, Your Honor. One of them is, it tends to refute the testimony of the experts called by the government, and the other reason is that it is direct evidence of value. In 2 Orgel on Valuation, Section 190; 'It is now the prevailing rule that estimates of reproduction costs may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand.' "

Appellant also stated, page 339:

"MR. HAWKINS: Except for the one thing, the question of whether or not the buildings are well adapted to the uses to which the land is devoted. Now if the building is well adapted to the land, then it seems to me the cost of reproduction

> less depreciation is a valid criterion, because the buyer is going to take that into consideration."

with the Court finally concluding as follows:

> "So I am inclined to go along with the decision of Judge Carter, and the general rule as he sets it forth, and therefore, it is the ruling that this evidence is not admissible in this particular case, because it is condemnation of property where you can establish fair market value outside of actual reproduction cost."

The offer of proof is as follows, page 347:

> "We offer to prove by the witness who was on the stand, Clarence Marshall, who is a competent and successful builder, and who has personal familiarity with buildings in question, that the cost less depreciation of the home which is Exhibit 68, is $11.00 a square foot, and that the cost less depreciation of the residence is $11.00 a square foot, and the cost less depreciation of the shop is $5.50 a square foot.
>
> * * *
>
> "The cost less depreciation of the improvements on the land would be in the neighborhood of $35,000.00."

3.

The trial court erred in denying appellant's motion for a new trial.

The basis of the specification of error is the trial court's ruling with respect to specification of errors Nos. 1 and 2.

## SUMMARY OF ARGUMENT

The trial court excluded the most significant comparable sale testified to by any of the experts, the sale from Floyd to Fox. The property was immediately adjacent to the subject property. It was committed by the execution of an earnest money receipt, a few days before the take, and fulfilled by the execution of the written contract a few days after the take. It was adjacent to Union Gap and like the subject property was in the so-called flood plain of the Yakima River, but was adjacent to State Highway 3, one of the main arterials from Yakima through Union Gap to the lower Yakima Valley. Fox did not buy the property because of the new proposed freeway, as he could not use the freeway in his housemoving business. He bought it for the purpose of re-establishing his business in the most suitable location. It should have been admitted to help guide the jury in evaluating the opinions of the experts.

The trial court also erred in refusing testimony as to reproduction, cost less depreciation of the buildings located upon the subject property. The expert witnesses for the plaintiff, appellee here, did not identify or refer to any sale of property *with comparable improvements*. The exclusion of this evidence materially affected the outcome of the case, as the jury was left completely uninformed as to the actual fair market value of the property *with the buildings* as a whole.

## APPELLANT'S ARGUMENT

### I.

An examination of the maps and aerial photos will establish that the subject property is adjacent to the town of Union Gap, a growing commercial and industrial community immediately south of the City of Yakima in Yakima County, Washington. The subject property at the time of the take was located upon U.S. Highway 97, State Highway 3. These highways had existed for some 25 or 30 years prior to the take. The property was used by appellant as headquarters for a housemoving operation. It consisted of several buildings to house the housemoving equipment and trucks and a yard for the assembly of such equipment. There was also located on U.S. Highway 97 two rental units and the home of appellant Fox. The land upon which these improvements were located was at the same level or grade as U.S. 97. To the east of the improvements the land dropped off into the so-called flood plain of the Yakima River. In that area Appellant Fox grazed and fed a few cattle. The experts for the appellee testified that the highest and best use of the subject property was that to which it was already being put, i.e., residential, rental and for a housemoving operation. (Reporter's Transcript pages 257 et seq. and 294 et seq.)

Prior to the take, appellant Fox noticed adjacent to his property a sign posted by George Lemon, one of the experts for the appellee, offering the property of Mr.

Floyd for sale. Mr. Fox then proceeded to George Lemon's office (the same George Lemon who was retained by appellee as its real estate expert and who testified on behalf of the appellee) and proceeded to negotiate the purchase of that property, Mr. Lemon collecting a full commission and the parties executing a valid and binding contract. Upon cross examination of Mr. Lemon, objection was sustained to a reference to that sale by the trial court. (Reporter's transcript pages 165-181) (Clerk's Transcript pages 85-119). There is little doubt that the admission of this particular comparable would have been destructive to the testimony of the experts for the appellee. It was closest to the take both in time and distance and it was virtually identical and could not help but establish proper fair market value. The admission of this comparable would undoubtedly have affected the verdict of the jury, yet it was excluded as we understood it, because the trial court felt that the purchase was influenced by the proposed new freeway, *yet there was no evidence to that effect.* On the contrary, Mr. Fox testified that the freeway had no bearing upon the purchase as in the housemoving business he was not allowed on the freeway. He testified that he had searched all over the area both above and below Union Gap, and could find nothing on U.S. 97 that was suitable, and for that reason he bought it. Clearly, the comparable was admissible. On Orgel, Volume 1, page 582-591, it is stated:

"In most jurisdictions, the courts have followed

the rule that evidence of sales of other similar property in the neighborhood is admissible on direct examination to prove the market value of the property in question. * * *

"* * * Meanwhile, we must note the qualifications applied to this type of evidence even under the majority rule. The three most important limitations concern: (a) degree of similarity between the property that was the subject of the sale and the property that is being valued; (b) proximity between date of sale and date of valuation; and (c) nature of the sale, as determined by the circumstances under which it was made.
* * *

"* * * In estimating land values, the question of location is important, and the courts emphasize the fact that the properties to be compared should be situated in the same general neighborhood or vicinity. * * *
* * *

"The courts make no attempt to describe minutely the essential constituents of similarity in market conditions. They usually assume that if property similar in other respects has been sold within a reasonable time of the taking, its sale price is relevant in determining the market value of property taken. As to what constitutes a reasonable time, a wide discretion is vested in the trial court and the appellate courts are reluctant to reverse the lower court's determination as a matter of law. In the usual run of cases, a sale within a year is admitted as a matter of course. In any case, however, a finding that the evidence falls within a reasonable time does not imply that market conditions are precisely the same and it remains open to either party to dispute the significance of the sale by proving a change in market conditions. Generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemnor."

The trial court erred in excluding the Floyd to Fox sale, and the appellant is entitled to a new trial for that reason alone.

II.

As indicated above, the subject property was improved with two rental units and a residence and buildings for the storage and maintenance of housemoving equipment and the yard for the assembly of such equipment. The property is located on U.S. 97.

Appellant sought to introduce into evidence through a qualified witness, testimony of the cost less depreciation of the improvements on the property. This offer was rejected. (Reporter's Transcript, pages 317-348).

The real estate experts testified that the highest and best use of the property was *the use to which Mr. Fox was already putting the property* (Reporter's Transcript, pages 257 and 258). (Reporter's Transcript, pages 294 and 295) Mr. Korn, appellee's witness, said on page 257:

"Q. Do you know whether or not the owner, Mr. Fox, conducted any business on the premises, or from it?

A. Yes, he had a shop building, and then he had some moving equipment; he was conducting a house-moving business at that time.

Q. Did he keep any cattle in the area?

A. Yes, he had a few cows.

Q. What, in your opinion, prior to the taking, was the highest and best use of this property?

A. Well, my opinion was that he was using it for the highest and best use. * * * Then of course

he had three houses on the bench land, and since the houses were already there, the highest and best use of the land would be for residential use. * * * Then the balance of the property had a shop on it, and again, I think that was being used to the highest and best use of the property. I felt he was using it as good as it could be used."

Mr. Lemon, also a witness of the appellee, said, page 294:

"Q. Right. Now going back to the parcel, what in your opinion was the highest and best use of that ownership just before the taking?

A. In my opinion, the highest and best use was for suburban homesite, much as it is being used now, and also it could have some small service business such as Mr. Fox has as a housemover. I think the use it is being put to now is about as good a use as it could be put to.

Q. And as to the balance?

A. Well, I am taking the whole tract into consideration, because that to the east is rough pasture land, and has some recreational value; it seems to be it would be an ideal setup for suburban homesite, with some recreation toward the river."

In arriving at values, the real estate expert, Mr. Lemon, testifying on behalf of the appellee, stated as follows, page 310:

"Q. (By Mr. Hawkins) Well, in arriving at this figure did you put a square-foot value on the home of Mr. Fox?

A. I made an estimate of the entire value of each of the buildings, including Mr. Fox' home.

Q. All right, what was your valuation on the home then?

A. Well, I valued the home at $9,200.00.

Q. At how much?

A. $9,200.

Q. And did you arrive at that by ascribing a square-foot value?

A. Well, in a way; by comparing it to other homes of like construction and came up with the unit value that I applied.

Q. And what was the unit value?

A. The unit value on that was about seven dollars and a half.

Q. Seven dollars and a half. Now there were two other residences, were there not?

A. Yes, sir.

Q. And did you use the same unit value for those residences?

A. Well, on Number 1—

Q. On Number 1 what unit value did you use?

A. Well, I used about $6.00, so that made about thirty six hundred.

Q. And on Unit Number 2 what unit value did you use?

A. On Unit Number 2, a little over $5.00.

Q. And the shop?

A. The shop, about $1.50 a foot, or $1.60 a square foot."

While it is true that the expert, Mr. Lemon, on direct examination testified to an overall before or after value, it is thus clear that this value was built upon a price per square foot basis.

Mr. Ralph Korn, also testifying on behalf of the appellee, testified in detail as to the number of square

feet in each building, gave an overall before and after value, but in relating his opinion as to comparable sales, we find that he used comparables which either did not have any improvements on them, or did not have comparable improvements, thus arriving at land values only—with no basis in fact for the value of the improvements. He testified, page 301:

"Q. Any improvements on it?

A. No improvements on it, no, sir."

The foregoing is on direct examination. The next comparable found on page 303 of the Court Reporter's transcript again has no improvements, and again on page 304, the witness arrives at a value of the Fox property of $750.00 per acre. Not one comparable had improvements similar to the improvements that were on the subject property. Again, by the same method as Mr. Lemon, the witness placed a value on improvements by a price per square foot.

Against this type of evidence, it seemed proper to introduce actual cost less depreciation figures, particularly in view of the fact that those witnesses had already established that the highest and best use of the subject land was the use to which it was being put. In other words, these witnesses were saying that the improvements resulted in the best use of the land.

The trial court excluded the proffer of the evidence of Mr. Clarence Marshall, upon the ground that there were comparable sales (but where are they?) and upon

the case found in 164 F. Supp. 451, *U.S. v.* 70.39 *Acres of Land* (Reporter's Transcript 330).

However, with respect to the first point, no expert witness referred to any single sale involving improvements comparable to the improvements on the subject property. Furthermore, each of the witnesses arrived at their overall value by fixing a per square foot price and used that as a basis for their opinion. The case relied on by the trial court is applicable to the situation where the improvements do not relate to the best use of the land, and consequently, their cost less depreciation does not relate to fair market value. Where the improvements do relate to the highest and best use *so that the well informed buyer does not discount such improvements*, then their cost less depreciation is a factor which the reasonably well informed buyer would take into consideration and therefore does constitute a factor which the jury should be entitled to consider. We rely on 2 *Orgel, Valuations*, Section 190:

> "It is now the prevailing rule that estimates of reproduction cost may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand."

This is exactly the situation in the case at bar. The foregoing authority cites *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 43 S. Ct. 442, 67 L. Ed. 809; *Stephenson Brick Co. v. United States*, 110 F. 2d 360 (5th Circuit); *U.S. v.* 2.4 *Acres of Land*, 138 F. 2d 295 (7th Circuit); *Clark v. U.S.*, 155 F. 2d 157 (8th Circuit); *Sedro-Woolley v. Willard*, 71 Wash.

646, 129 P. 372. See also 27 Am. Jur. 2d, page 351, where it is said:

> "The prevailing rule is that evidence of the reproduction cost of an improvement, with proper allowances for depreciation, is competent as a circumstance to be considering in valuing the whole property, provided that the improvement adds value to the land in reasonable proportion to such cost."

In view of the fact that the comparables cited by the experts did not relate to comparable improvements, in any way, shape or form, and in view of the fact that the appellee's experts agreed that the property was being used for its highest and best use, it would seem clear that the proffered testimony should have been admitted, and considered by the jury under appropriate instructions. The failure to admit such evidence constituted alone prejudicial error, entitling appellant to a new trial.

## CONCLUSION

It is respectfully submitted that because of these errors by the trial court, appellant is entitled to a new trial.

Respectfully submitted,
KENNETH C. HAWKINS
*Attorney for Appellant*

## APPENDIX

| Exhibit No. | Identified | Received | Exhibit No. | Identified | Received |
|---|---|---|---|---|---|
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| P-11 | 297 | 297 | D-62 to | | |
| P-18 | 415 | 415 | D-66 | 472 | 472 |

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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